IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 24209-9-III**
Respondent,	)	
	)	**Division Three**
v.	)	
MICHAEL ANTHONY STONE,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	

SCHULTHEIS, J. — Michael Anthony Stone appeals convictions for possession of a stolen firearm and first degree trafficking in stolen property. Mr. Stone contends that the court erred by instructing the jury it could convict him on alternate means of committing the crime of possession of a stolen firearm when the State only charged him with one means. He also contends that the court erred in instructing the jury it could convict him as an accomplice without finding him guilty of all of the elements of accomplice liability. We agree with both contentions and reverse his convictions.

FACTS

In the spring of 2003, Wayne Littlefield burgled a home in Kennewick,

Washington from which he took a black 9 mm gun. When he became a suspect in the crime and in other burglaries, he gave the gun to Thomas Nimmo and asked him to get rid of it. The next day Mr. Nimmo was at his father's house when he ran into Mr. Stone, a friend of Mr. Nimmo's father. Mr. Nimmo asked Mr. Stone if he could help Mr. Nimmo get rid of a stolen gun. Mr. Stone said he might be able to help. Mr. Nimmo said the gun was behind his door. Mr. Nimmo then left, and when he returned, the gun was gone.

When Mr. Nimmo learned the police were looking for the gun, he tracked down Mr. Stone. Mr. Stone said that he already got rid of the gun and he could not get it back. Mr. Stone gave Mr. Nimmo $180.

Mr. Stone was charged with possession of a stolen firearm on November 7, 2003. The information was amended on April 25, 2005 to include one count of first degree trafficking in stolen property. Mr. Stone was found guilty as charged after a jury trial. He was sentenced to the low end of the standard range on each charge on May 27, 2005.

DISCUSSION

a. Possession of a Stolen Firearm

Mr. Stone contends that the trial court instructed the jury on uncharged alternatives to the crime of possession of a stolen firearm. Whether a jury instruction accurately states the law without misleading the jury is reviewed de novo. *State v. Chino*, 117 Wn. App. 531, 538, 72 P.3d 256 (2003) (citing *State v. Linehan*, 147 Wn.2d 638, 643, 56 P.3d

542 (2002)). Mr. Stone did not object to the instruction at trial. But because this issue involves the omission of elements of the charged crime it is a "manifest error affecting a constitutional right," and this court may consider the issue for the first time on appeal. RAP 2.5(a)(3); *Chino*, 117 Wn. App. at 538.

The trial court instructed the jury to convict if the evidence proved beyond a reasonable doubt that Mr. Stone possessed, carried, delivered, sold, or was in control of a stolen firearm.[1] RCW 9A.56.310(1). But the State charged only that Mr. Stone had unlawfully possessed a stolen firearm, not that he had carried, delivered, sold, or was in

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[1] The court's Instruction 11 read:

> To convict the defendant of the crime of possessing a stolen firearm, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about May 1, 2003 to June 1, 2003, the defendant possessed, carried, delivered, sold or was in control of a stolen firearm;
>
> (2) That the defendant acted with knowledge that the firearm had been stolen;
>
> (3) That the defendant withheld or appropriated the firearm to the use of someone other than the true owner or person entitled thereto;
>
> (4) That the acts occurred in the State of Washington.
>
> If you find from the evidence that each one of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Clerk's Papers (CP) at 56.

control of one.[2] The defendant must be informed of the criminal charges against him, and he cannot be tried for an uncharged offense. *State v. Irizarry*, 111 Wn.2d 591, 592, 763 P.2d 432 (1988). Accordingly, it is error to instruct the jury on alternative means of committing an offense not alleged in the information. *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988); *Chino*, 117 Wn. App. at 540. An instruction that offers an uncharged alternative means as a basis for conviction is "presumed prejudicial unless it affirmatively appears that the error was harmless." *Bray*, 52 Wn. App. at 34-35. The instruction is prejudicial "if it is possible that the jury might have convicted the defendant under the uncharged alternative." *State v. Doogan*, 82 Wn. App. 185, 189, 917 P.2d 155 (1996). The State does not dispute that instructing the jury on uncharged alternative means was error, but argues it was harmless error because the jury did not consider the uncharged alternative means.

The State relies on *State v. Severns*, 13 Wn.2d 542, 549, 125 P.2d 659 (1942),

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[2] The amended information read:

> That the said **MICHAEL ANTHONY STONE** in the County of Benton, State of Washington, during the time intervening between the 1st day of May, 306 [sic], and the 3rd day of January, 1920 [sic], in violation of RCW 9A.56.310 and RCW 9A.56.140, did knowingly possess black 9mm Rueger [sic], a firearm knowing it was stolen and withheld such firearm to the use of a person other than James Mokler the person entitled to such firearm.

CP at 77.

which held instructing the jury on uncharged means of committing a crime may be harmless if "in subsequent instructions the crime charged was clearly and specifically defined to the jury." The State argues that the error was harmless in this case because the trial court instructed the jury in the definition of possession of a stolen firearm but did not provide definitions for any uncharged alternative means. That argument is not persuasive. The defining instruction referred to in *Severns* is intended to "expressly preclude[] the jury from considering the uncharged means." *Bray*, 52 Wn. App. at 34 (citing *Severns*, 13 Wn.2d at 549). There was no such limiting instruction to render the error harmless in this case.

The State also asserts that the only theory it presented at trial to support the charge was that Mr. Stone possessed the stolen firearm and that the State did not present any evidence to support the uncharged alternatives. The State claims it "did not argue that the jury could find the defendant guilty of possession of a stolen firearm if the defendant *carried it, delivered it, sold it, or was in control of it*." Resp't's Br. at 6 (emphasis added). To the contrary, the record shows that the State advocated *every* uncharged alternative. For instance, in closing, the prosecutor argued:

> Staying away from credibility right now, all the elements have been met. If you believe the testimony the defendant knowingly possessed, *carried, delivered, sold or was in control of a firearm*, he knew the firearm was stolen, there was a deprivation of the rightful owner and the acts occurred in Washington.

Report of Proceedings (Apr. 28, 2005) at 73 (emphasis added).

In *Severns*, the Supreme Court found that the deputy prosecutor's reference to the uncharged means in closing argument made the error particularly egregious. 13 Wn.2d at 551-52.

Moreover, the State presented evidence in this case from which the jury could have concluded that uncharged alternative means were proven and the jury would have been justified in believing it could find the defendant guilty on the basis of the offending instruction. *Id.* at 552.

We cannot say that the jury did not convict Mr. Stone on the basis of uncharged alternatives. The error was not harmless.

b. Trafficking in Stolen Property

Mr. Stone contends that the court erred when it allowed the jury to consider accomplice liability in the to-convict instruction for trafficking in stolen property without instructing the jury in the elements.[3] This court reviews claims of legal errors in

[3] In Instruction 9, the jury was instructed:

> To convict the defendant of the crime of trafficking in stolen property in the first degree each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That between May 1, 2003 and June 1, 2003 the defendant knowingly sold, transferred, distributed, dispensed, or otherwise disposed of stolen property to another person, *or was an accomplice to someone who sold, transferred, distributed, dispensed, or otherwise disposed of stolen property to another person*;

instructions de novo. *State v. Woods*, 143 Wn.2d 561, 590, 23 P.3d 1046 (2001).

Criminal liability is the same whether one acts as a principal or as an accomplice. RCW 9A.08.020(1), (2)(c). But principal liability and accomplice liability are alternative theories of liability. *State v. Jackson*, 137 Wn.2d 712, 726-27, 976 P.2d 1229 (1999); *see* RCW 9A.08.020(3) (defining complicity).

Though the State is not required to charge the accused as an accomplice, in order to pursue accomplice liability at trial, the trial court must instruct the jury on accomplice liability. *State v. Davenport*, 100 Wn.2d 757, 764-65, 675 P.2d 1213 (1984). Here, the to-convict instruction allowed the jury to consider accomplice liability. But the instruction did not include the statutory mens rea requirement. Under RCW 9A.08.020(3)(a), to be convicted as an accomplice, a defendant must have knowledge that his conduct will promote or facilitate the commission of the crime. It is reversible error to instruct a jury to hold a defendant vicariously liable without finding him guilty of all of

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> (2) That the defendant acted with knowledge that the property had been stolen;
>
> (3) That the acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

CP at 54 (emphasis added).

the elements of accomplice liability. *State v. Stein*, 94 Wn. App. 616, 628, 972 P.2d 505 (1999), *aff'd*, 144 Wn.2d 236, 27 P.3d 184 (2001). The trial court's role is to determine questions of law and to explain the law of the case to the jury through its instructions. *State v. Huckins*, 66 Wn. App. 213, 217-18, 836 P.2d 230 (1992). "The trial court may not delegate to the jury the task of determining the law." *Id.* at 217 (citing *United States v. Zipkin*, 729 F.2d 384 (6th Cir. 1984)). By failing to completely instruct the jury here, the trial court left the jury to determine the law.

The State asserts that the accomplice liability instruction is a definitional instruction that is not an essential element, the absence of which cannot be raised for the first time on appeal. It relies on *State v. Scott*, 110 Wn.2d 682, 690-91, 757 P.2d 492 (1988). *Scott* involved the definition of "knowledge," which the court found not to be a technical term requiring an instruction when the word is used to define a criminal offense. *Id.* at 692. The meaning of accomplice liability is not as straight forward as the definition of knowledge.

Mr. Stone asserts that the error may be raised for the first time on review because it inserts accomplice liability without the legal definition. Therefore, the instruction releases the State from its burden to prove an essential element of the charged crime such as the statutory mens rea. The State is then relieved of its burden of proving all of the elements of the charged crime beyond a reasonable doubt, which affects his constitutional

right to a fair trial. *State v. Moran*, 119 Wn. App. 197, 211, 81 P.3d 122 (2003) (citing *Stein*, 144 Wn.2d at 241). The issue may therefore be raised for the first time on appeal. *Id.* (citing RAP 2.5(a)(3)).

Mr. Stone argued at trial that the State simply did not prove its case; there was no evidence that Mr. Stone sold the gun or was even seen with it. Mr. Stone elicited evidence that Mr. Nimmo's door was not locked and many people came in and out of Mr. Nimmo's father's house all of the time. The State did not speculate as to how the gun sale transaction it alleged to substantiate the trafficking charge actually occurred. The prosecutor frankly admitted to the jury that there was a lack of direct evidence and that the State presented a case of circumstantial evidence. The prosecutor properly explained that direct evidence has the same value as circumstantial evidence. *See State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999). However, that left open countless possibilities under the circumstances presented. Given the State's acknowledgement together with the defense argument that anybody could have committed the crime, the error was not harmless.

The jury could have applied the common definition of accomplice when implementing the to-convict instruction. An accomplice is "one associated with another in wrongdoing: one that participates with another in a crime either as principal or accessory." Webster's Third New International Dictionary 12 (1993). This definition

does not contain the statutory knowledge requirement that the actor's conduct will promote the crime. Taking into consideration the evidence and counsel's arguments, the jury may have determined that Mr. Stone trafficked in stolen property due to the actions of countless others within the house without the requisite mens rea.

A constitutional error is harmless if it appears beyond a reasonable doubt that the error did not contribute to the verdict obtained. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (citing *Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). We cannot say that the jury's verdict would have been the same absent the error. The error was not harmless.

c. Other Issues

In additional grounds for review, Mr. Stone seeks dismissal for denial of a "speedy arraignment." His argument is based on the old rule-based right to speedy trial scheme in former CrR 2.2 (1995), former CrR 3.3 (2001), and former CrR 4.1 (1973). Notably, former CrR 4.1 was amended, effective September 1, 2003, to provide that "'[a]ny delay in bringing the defendant before the court shall not affect the allowable time for arraignment, regardless of the reason for that delay.'" *State v. Castillo*, 129 Wn. App. 828, 831, 120 P.3d 137 (2005) (quoting CrR 4.1(a)(2)). The record shows that Mr. Stone was arraigned on February 20, 2004. Therefore, "any delay that occurred before then does not 'affect the allowable time' for [his] arraignment, 'regardless of the reason for

that delay.'" *Id.* (quoting CrR 4.1(a)(2)).

In light of our decision we need not reach the other issues raised that would require reversal but not dismissal.

CONCLUSION

It was reversible error to instruct the jury on uncharged alternatives to possession of a stolen firearm when the jury could have convicted Mr. Stone on the basis of the uncharged alternatives. It was also reversible error to instruct the jury that it could convict Mr. Stone as an accomplice to first degree trafficking in stolen property without finding him guilty of all of the elements of accomplice liability. Accordingly, we reverse both convictions.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Schultheis, J.

WE CONCUR:

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Sweeney, C.J. Kato, J.